93-586

In the

SUPREME COURT of the UNITED STATES

Supreme Court, U.S.
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October Term, 1993

RONALD P. FEDORYK,

Petitioner,

v.

HON. JAMES B. DUDLEY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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September 7, 1993

QUESTION PRESENTED

1. Whether criminal prosecution of a Defendant by an attorney who participated in an attorney-client consultation with the Defendant concerning the charges that were later prosecuted violates the Defendant's due process rights.

PARTIES TO THE PROCEEDING

Ronald P. Fedoryk petitioned in the United States District Court for the District of Maryland for a writ of habeas corpus, to overturn his conviction in the Circuit Court for Howard County, Maryland, on a charge of Driving While Under the influence of alcohol ("DUI"), and then unsuccessfully appealed the denial of habeas relief to the Untied States Court of Appeals for the Fourth Circuit.

The Honorable James B. Dudley, a Respondent, presided at the criminal trial of Petitioner in the Circuit Court for Howard County, Maryland.

Respondent J. Joseph Curran, Jr., is the Attorney General of Maryland.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

PARTIES TO THE PROCEEDING..... ii

OPINIONS BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 4

ARGUMENT..... 13

CONCLUSION..... 34

APPENDIX..... 1A

TABLE OF AUTHORITIES

Cases

Crest Inv. Trust, Inc. v. Comstock, 23 Md.App. 280, 327 A.2d 891 (Md.Ct.Sp.App. 1974)..... 32

Ex parte Spain^S, 589 SW2d 132 (Ct.Cr.App.Tex 1977) (en banc).... 23,24, 34

Green v. Montgomery Co., 764 F.Supp. 841 (M.D.Ala. 1992)..... 25,26, 27

Hannon v. State, 48 Ala.App. 613, 266 So.2d 825..... 30,31

Satterwhite v. State, 359 So.2d 816, (1977)..... 28

United States v. Schell, 775 F.2d 559 (4th Cir. 1985)..... 13, passim

Rules

Rule 1.9 of the Maryland Lawyers' Rules of Professional Conduct..... 22
22

Standards

American Bar Association, Standards Relating to the Prosecution Fucntion and the Defense Function..... 23

OPINIONS BELOW

▸ An opinion of the United States Court of Appeals for the Fourth Circuit, issued June 9, 1993. A. 1.

▸ Certificate of Probable Cause issued by the United States District Court for the District of Maryland, issued October 30, 1993. A. 9

▸ Order of the United States District Court for the District of Maryland, filed September 29, 1992. A. 10.

▸ Report and Recommendation of the United States Magistrate-Judge, filed September 11, 1992. A. 12.

▸ Order of the Court of Appeals of Maryland, denying petition for writ of certiorari, dated October 9, 1991. A. 33.

▸ Transcribed comments of trial judge (in the Circuit Court for Howard County, Maryland) upon denying motion for new trial on June 6, 1991. A. 34.

JURISDICTION

The judgment of which Petitioner seeks review was set forth in an opinion issued by the United States Court of Appeals for the Fourth Circuit on June 9, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1). Jurisdiction of the appellate court was invoked pursuant to 28 U.S.C. 2253, for appeal of the district court's denial of a petition for writ of habeas corpus presented to the district court pursuant to 28 U.S.C. 2241.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment 14:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Rules,

Rule 4-331. MOTIONS FOR NEW TRIAL

(a) Within Ten days of Verdict. -- On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.

(b) Revisory Power. The court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:

* * *

(2) in the circuit courts, on motion filed within 90 days after its imposition of sentence.
Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.

Maryland Lawyers' Rules of Professional Conduct.

Rule 1.9.

CONFLICT OF INTEREST: FORMER CLIENT.

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents

after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

STATEMENT OF THE CASE

Ronald P. Fedoryk, Petitioner, was stopped by a police officer shortly after midnight on December 24, 1989, as he entered Interstate 95 in Howard County, Maryland. After "field sobriety tests" Petitioner was charged with allowing his vehicle unlawfully to cross the right-hand lane marker on a nearly State road, which was the purported reason for the stop, and with driving while intoxicated ("DWI"). [1/]

A few days later, in early January, 1991, Petitioner went to the law office of Bernard A. Taylor, Esq., in Ellicott

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1. Petitioner was charged pursuant to Maryland Code, Transportation Article, § 21-902.

City, Maryland, and there related to Mr. Taylor "all of the pertinent facts" concerning the charges laid against him. A. 43. Nothing that Petitioner said on that occasion afforded any basis for concluding that he was guilty of any criminal violation, *id.*, and Petitioner affirmatively denied in his affidavit that he was either intoxicated or under the influence of alcohol at the time of the incident in question. A. 51.

After hearing Petitioner's full account of the facts pertinent to the charges against him, Mr. Taylor announced that he was a part-time prosecutor in the Howard County State's Attorney's Office and for that reason could not represent Petitioner in the criminal proceeding for which Petitioner had sought to employ him.

Petitioner stood trial in the District Court of Maryland for Howard

County and was convicted, without a jury, on the DWI charge. Petitioner was acquitted of the charge -- unlawfully crossing a lane-marker -- that allegedly led to the initial stop of his vehicle.

Pursuant to Maryland law, Petitioner appealed and thereby triggered his right to a *de novo* trial by jury in the Circuit Court for Howard County. His trial commenced on April 15, 1991.

During the first day of trial Petitioner realized that the prosecutor was the same attorney whom he had consulted -- concerning the DWI charge -- in early January of the previous year, Bernard A. Taylor, Esq. But because Petitioner had said nothing inculpatory to Mr. Taylor during the office consultation, the issue of the prosecutor's conflict of interest was not raised during the trial.

Petitioner was convicted by the jury

on a lesser charge of "driving while under the influence" of alcohol. Petitioner's conviction rested largely on the arresting officer's testimony concerning a "field sobriety test". Petitioner vigorously disputed every aspect of the officer's testimony.

Within 10 days after the return of the jury's adverse verdict, Petitioner filed a motion for new trial, pursuant to Maryland Rule 4-331(a). [2/] In the motion

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2. The pertinent text of Rule 4-331 is as follows:

> **Rule 4-331. MOTIONS FOR NEW TRIAL**
>
> **(a) Within Ten days of Verdict.** -- On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.
>
> **(b) Revisory Power.** The court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:
>
> * * *
>
> (2) in the circuit courts, on motion filed within 90 days after its imposition of sentence.
>
> Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.

Petitioner complained for the first time about Mr. Taylor's conflicted roles: as a participant in the consultation that occurred within days after Petitioner's arrest, and then as prosecutor. A. 59.

Although Mr. Taylor insisted he had no recollection of having been consulted by Petitioner, Petitioner's affidavit submitted with the new trial motion included the following account:

> 5. During the first day of the trial, I first realized that an attorney whom I had consulted to represent me in the instant case -- i.e., Mr. Taylor -- was serving as prosecutor in the case. In his cross examination of me during the defense phase of the trial, Mr. Taylor asked me if I had "ever discussed this case with anyone else" or words to that effect. When he asked me this question, Mr. Taylor initially appeared to be puzzled or perplexed, and then an expression of recognition appeared upon his face. He appeared to be confused and perplexed for several minutes thereafter, and then withdrew the question.
>
> 6. At no time until the late afternoon of Thursday, April 18, 1991, did I realize or recognize that there could be any impropriety in Mr. Taylor serving as prosecutor, since I had not

admitted any wrongdoing in my consultation with him and had asserted to him that I was completely innocent of any wrongdoing.

7. Except as stated above, at no time did Mr. Taylor disclose to me any conflict or potential conflict of interest posed by his serving as prosecutor in the instant case after having been consulted by me for the purpose of representing me in connection with the charges that were tried as aforesaid. Nor did Mr. Taylor ever obtain or attempt to obtain my consent to his serving as prosecutor in the instant case.

A. 85-86.

Confronted with Petitioner's new trial motion supported by competent, undisputed evidence that Petitioner had given an account of "all pertinent facts" [3/] to the prosecutor in the course of an

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3. During the hearing his motion for new trial, Petitioner testified as follows concerning his consultation with Mr. Taylor:

Q Now, Mr. Fedoryk, . . . Would you tell the Court what, if any, statement or, or interruption was made by Mr. Taylor during the course of your interaction with him?

A There were no interruptions. I presented the information on the case and the facts and the details as to what happened. I handed to him all the paperwork that was associated with the case, the tickets, the

attorney-client consultation with Mr. Taylor, the trial judge (Respondent James B. Dudley, Associate Judge of the Fifth Judicial Circuit of Maryland) concluded the situation presented by Petitioner was not "remotely" similar to that of In re Spain, 589 SW2d 132 (Cr.Ct.App.Tex., 1977), wherein an attorney had actually appeared as counsel to an individual whom he subsequently prosecuted for violation of probation. "That case is factually inapplicable to our situation", the trial judge stated on the record. A. 36.

The judge said the issue in the

...Continued...

> arrest report, the commissioner's release report, all -- and all other documentation, the DR15 and other papers that were handed to me, and he also reviewed those. But there was no interruption during the context of my presentations and our conversation until it was, 'til we concluded.
>
> Q And, and when did he indicate to you that he could not represent you?
>
> A After my -- after our discussion was over.

[The above dialogue is not included in the Appendix hereto.]

instant case was whether there had been prosecutorial misconduct, and he concluded there had not been. *Id.* Accordingly the motion for new trial was denied. *Id.*

Petitioner sought review on writ of certiorari by the Court of Appeals of Maryland. The writ was denied without comment. A. 32.

Petitioner then petitioned in the United States District Court for the District of Maryland for a writ of habeas corpus. The case was referred to a magistrate-judgment, who recommended denial of the writ on the same ground as that assigned by Judge Dudley: that there had been no representation of Petitioner by the prosecutor. A. 12, *et seq.*

After obtaining a certificate of probable cause, Petitioner appealed to the United State Court of Appeals for the Fourth Circuit, which affirmed the

district court's denial of habeas relief. A. 1-7. As the State court and the district court before it, the Fourth Circuit found there had been no representation of Petitioner by Mr. Taylor. A. 4.

ARGUMENT

Criminal prosecution of a Defendant by an attorney who participated in an attorney-client consultation with the Defendant concerning the charges that were later prosecuted violates the Defendant's due process rights.

In United States v. Schell, 775 F.2d 559 (4th Cir. 1985), the United State Court of Appeals for the Fourth Circuit recognized that a *per se* violation of the due process clause occurs when an attorney becomes professionally involved in the prosecution of a former client who had discussed the subject matter of the prosecution with him as her attorney. Petitioner submits that the principles enunciated in Schell compel reversal of his DUI conviction.

The district court concluded that the communication that occurred herein did not constitute "representation" within the contemplation of Schell. Petitioner respectfully disagrees.

Here are the factual parallels between Schell and the case *sub judice* that compel vacatur of Petitioner's conviction:

1. In Schell, Wilson sought to employ Jividen, an attorney, to represent her in connection with her compelled appearance before a federal grand jury. Schell, *supra* at 562.

Here, Petitioner sought to employ Bernard Taylor, Esq., an attorney, to represent him in connection with a DWI charge. Petitioner's Affidavit in support of motion for new trial at 2, ¶ 4, which shall be referred to herein as "new trial affidavit". ("In late January or early February, 1990, I engaged in an attorney-client consultation with Mr. Taylor for the purpose of retaining him to represent me in the defense of the subject [DWI and lane-changing] charges." A. 83-84.)

2. In Schell, Wilson conferred with Jividen both prior to her testimony to the grand jury and during a break in her testimony. *Id.* Wilson maintains that she told Jividen nothing incriminating. *Id.*, at 563.

Here, Petitioner met with Taylor in Taylor's office and told him all pertinent facts, none of which was inculpatory. ("During the course of this [attorney-client] consultation I related to Mr. Taylor all facts within my knowledge that were pertinent to the subject charges. I admitted no guilt and stated no facts from which guilt of any criminal wrongdoing could have been inferred. ") New trial affidavit, at 2, ¶ 4; A. 84.

3. In Schell, Jividen never entered his appearance as counsel for Wilson, and never communicated to anyone on her

behalf.

The facts here are the same. At the conclusion of the above-described consultation between Petitioner and Taylor, Taylor advised Petitioner that he could not represent him because of his part-time employment by the Howard County State's Attorney's Office. Taylor thereafter took no action on behalf of Petitioner, except to refer Petitioner to another attorney. New trial affidavit, at 2, ¶ 4; A. 63. It is undisputed, however, that Petitioner related to Taylor all of the pertinent facts. [1] A. 84.

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1. In testimony during the hearing in the Circuit Court on Petitioner's motion for new trial, Mr. Taylor stated that he had no recollection of ever having seen Petitioner before the trial. He also testified that his office practice was to open a file on any client with whom he consulted, but that he had no file on Petitioner. Mr. Taylor's testimony simply does not address the question of the extent or completeness of the facts related to him by Petitioner, and cannot properly be deemed as controverting Petitioner's account of the consultation.

4. In Schell, four months after consulting with Wilson as described above, Jividen became employed by the United States Government as a member (Coordinator for the Northern District of West Virginia) of a Presidential Narcotics Task Force, which prosecuted and obtained a conviction of Wilson. Schell, at 562.

Some 14 months after the subject consultation between Petitioner and Taylor, [2/] Taylor appeared as prosecutor in a Circuit Court jury trial that resulted in Petitioner's conviction of driving while under the influence of alcohol in the very same incident that

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2. The lapse of time between Petitioner's consultation with Mr. Taylor and Mr. Taylor's appearance as prosecutor in Petitioner's trial on the same charges that were the subject of the consultation is measured from the reference to "late January or early February, 1990," in ¶ 4 of the new trial affidavit and the date of the jury trial as indicated in the transcript of that trial, April 15-16, 1991.

Petitioner had previously discussed with Taylor.

In Schell, the Fourth Circuit reversed the conviction of Wilson, concluding that Jividen's participation "was *per se* prejudicial". The conviction of another individual, Cain, who had also consulted Jividen, and had made incriminating remarks to him, also was reversed. Here are the court's comments.

> The relationship between an attorney and his client is a sacred one. In that relationship, the client must be secure in the knowledge that any information he reveals to counsel will remain confidential. The confidentiality of the attorney-client relationship is severely compromised, if not destroyed, when, after representing a client [emphasis supplied], a lawyer joins in the criminal prosecution of that client with respect to the identical matter about which the attorney originally counseled the client. [Emphasis in original.] Such switching of sides is fundamentally unfair and inherently prejudicial. Without question, the client's right to a fair trial, secured by the due process clauses of the fifth and fourteenth amendments, is compromised under these circumstances. [Emphasis supplied.]

Schell, *supra* at 565.

The Fourth Circuit rejected the government's argument in Schell that the conviction should be affirmed because Jividen had recused himself from the separate investigations of his former clients, Jividen had no part in discussions leading to indictments, Jividen did not present any of the indictments and was not present during the presentment of the indictments, and, finally, that Jividen possessed no "confidential information with respect to his former clients." Id., at 565. The court responded to this argument as follows:

> Assuming that all of the government's assertions are true, the fact remains that Jividen represented Wilson and Cain with respect to the very same criminal activity which led to the indictments he ultimately helped to prosecute and under which Wilson and Cain were convicted. [Footnote omitted.] * * *
>
> We conclude that due process is

> violated when an attorney represents a client and then participates in the prosecution of that client with respect to the same matter. [Emphasis supplied.]

Id., at 565-566.

Thus, although Jividen never entered his appearance on behalf of Wilson, his consultation, or "counseling" of Wilson constituted representation sufficient to bar him from participating in a later prosecution of her in connection with the matters that they had discussed. Moreover, it is clear from the facts recited above that Jividen at no time participated on behalf of Wilson in any communication with the authorities, and, just as in the case *sub judice*, Wilson communicated nothing to Jividen that incriminated her.

Jividen did speak to Wilson just before her grand jury testimony, but clearly that activity was merely a consultation -- a consultation that was

perhaps more urgent than the one here involved, but still a consultation. Clearly, Jividen did not serve as Wilson's advocate either formally by entering his appearance in the subject proceeding, or informally by communicating with the prosecuting authorities on her behalf as he did for Cain. Nevertheless the Fourth Circuit clearly concluded that Jividen had represented Wilson.

With respect to Cain, moreover, Jividen did communicate on his behalf with authorities, and thus in a literal sense did "represent" Cain. Schell, at 562. ("Thereafter [*i.e.*, after a meeting with Cain, Wilson and another individual], Jividen notified the United States Attorney that Cain intended to assert the fifth amendment and was informed that Cain would be released from his grand jury subpoena.")

Thus, the Fourth Circuit was confronted with two different situations with respect to Wilson and Cain. Jividen engaged in no communications on behalf of Wilson with authorities, but he did communicate with the authorities on behalf of Cain. Yet, the Fourth Circuit referred to Jividen's having "represent[ed]" both Cain and Wilson, and made no distinction between Jividen's role with respect to Wilson and with respect to Cain. Therefore, it is manifest that the term "representation" as contemplated by the Fourth Circuit in Schell includes consultation, and may be limited to consultation.

The Fourth Circuit 's holding in Schell is of course consistent with the import of Rules 1.7 and 1.9 of the Maryland Lawyer's Rules of Professional Conduct; the authority principally relied

on by Petitioner in the new trial and certiorari proceedings, Ex parte Spain, 589 S.W.2d 132 (Tex. Cr. App. 1979), wherein a *per se* rule also was recognized; and Section 1.2 of the American Bar Association's Standards Relating to the Prosecution Function and the Defense Function.

The ABA's position, in pertinent part, is that:

> (a) A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties. [Emphasis supplied.]
> (b) A conflict of interest may arise when, for example, . . .
> (ii) a former client or associate is a defendant in a criminal case.

The Spain court also quoted from the commentary to the above section:

> . . . When a conflict of interest may arise the prosecutor should recuse himself and make appropriate arrangements for the handling of that particular matter by other counsel . . . It is of the utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of

> partiality may cast a shadow over the integrity of his office. [Emphasis supplied.]

Supra, 589 S.W.2d at 134.

The Spain court then added its own comment: "When a district attorney prosecutes someone whom he previously represented in the same case, the conflict of interest is obvious and the integrity of the prosecutor's office suffers correspondingly." [Emphasis in original.] *Id.*

The conviction of Petitioner in a trial in which the prosecutor had previously been consulted by Petitioner concerning the very charges that were tried cannot stand. No fine reading of the pertinent language is needed to arrive at that conclusion, and any narrower conclusion -- such as a requirement limiting the rule to situations in which there is a formal entry of appearance -- would eviscerate

it. It is obvious, moreover, that the danger of unfairness is so great when a lawyer "changes sides" to join the prosecution that a *per se* rule is necessary, as the Fourth Circuit held in Schell.

In affirming the denial of habeas relief, the Fourth Circuit also drew upon Green v. Montgomery Co., Ala., 764 F.Supp. 841 (M.D.Ala. 1992), where the court found that an individual failed to establish that his former attorney, who later represented a civil adversary, had information related to the representation of the adversary.

Unmentioned by the Fourth Circuit, however, was the Green court's conclusion that a telephone call in which Green discussed with his former lawyer the factual bases of a civil suit disqualified the former attorney from representing Green's adversary in that

civil suit.

The Fourth Circuit sought support also in the following language from Green:

> [If] the attorney made it clear to the would-be client that there is no attorney-client relationship and if the evidence further reflects that the would-be client should have known that the relationship had not advanced to the point at which it could be deemed a representation, then there would be no attorney-client relationship despite the would-be client's subjective belief.

Supra, 784 F.Supp. at 845-46.

The above principles, while salutary, do not apply to the undisputed facts presented by Petitioner's motion for new trial. Petitioner affirms in his affidavit that he gave his entire account of the incident that included his arrest and booking, and only after his account did Mr. Taylor state that he could not provide the requested representation. A. 84.

Thus, at the time Petitioner's

account was given to Mr. Taylor, Petitioner reasonably believed that Mr. Taylor would represent him: he had no reason to believe otherwise. Nor was there any reason to believe that the "relationship" between Petitioner and Mr. Taylor, at the time of Petitioner's account to Mr. Taylor, "had not [yet] advanced to the point at which it could be deemed a representation". Green, *supra*.

Thus the teachings of Green lead to the conclusion that when an individual communicates something to an attorney that is intended to elicit legal advice, that communication is necessarily privileged, and a privileged communication is an undeniable signal of legal representation.

Similarly, an Alabama state court (the Court of Criminal Appeals) found sufficient representing in the following

facts to erect a bar against adverse representation by the attorney.

> Mr. Wood [an attorney] called appellant into his private office and discussed the cases [in which appellant was charged with selling marijuana] against him to the extent, at least, that he could fix a fee for representing him. Mr. Wood testified at the hearing on the motion for a mistrial based on a conflict of interest and admitted he quoted appellant a fee of $500.00, plus expenses, to defend in the Circuit Court. Mr. Wood was somewhat vague and indefinite as to t4he details of the charges related to him by appellant but he did recall that appellant mentioned that he had a previous criminal record. He certainly got enough details from appellant to be in position to quote him a fee to represent him on the pending charges.
>
> Appellant did not pay Mr. Wood the quoted fee and left the office. Mr. Wood stated that he did not make a file in appellant's case as he did not return to his office.

Sattewhite v. State, 359 So.2d 816, 817-818 (1977).

On the above facts, the court reversed a conviction obtained through the attorney active participation in the prosecution of Mr. Satterwhite. Allowing such a conviction to stand "would

constitute an act wholly at war with due process of law." *Id.*, 818. The court did not analyze the extent of information, if any, actually used by the attorney in the prosecution of Mr. Satterwhite.

A further point that buttresses Petitioner's claim that the prosecutor was impermissibly conflicted is that the statement made by Petitioner to Mr. Taylor was undoubtedly privileged. Indeed, Petitioner went into Mr. Taylor's office and gave a full account of the incident leading to his arrest and the charges laid against him. The State has never suggested that Petitioner's statements were unprivileged.

But if the statement given by Petitioner to Mr. Taylor was privileged, then it would seem undeniable that there was, at least at that point in time, an attorney-client relationship, which the

Fourth Circuit denies.

Given, then, that the statement made by Petitioner to Mr. Taylor, the (part-time) prosecutor, was surely privileged, then there was with equal certainty an attorney-client relationship, and hence representation within the meaning of Rule 1.9 of the Maryland Rules of Professional Conduct.

Therefore, Mr. Taylor's ssubsequent prosecution of Petitioner violated 14th Amendment due process guarantees.

The language in virtually every decision that addresses the issue Petitioner seeks to raise herein -- or certainly in those decisions where relief was granted to the former client -- speaks eloquently to the importance of the instant case.

Here is the comment of the court in Hannon v. State, 48 Ala.App. 613, 266 So.2d 825:

> 'The injury [of permitting the conviction to stand after the prosecutor's conduct] would not be limited to the defendant -- there is injury to the entire system of justice, to the law as an institution, to the community at large, to the democratic ideal reflected in the processes of our court, and would destroy the last vestige of public confidence and respect in the administration of our criminal laws.'

In its slip opinion at A. 4, the Fourth Circuit states that an attorney-client relationship requires that "the advice of counsel [be] 'sought and received.' Crest Inv. Trust, Inc. v. Comstock, 327 A.2d 891, 901 [23 Md.App. 280, 296-297] (Md.Ct.[Sp.]App. 1974)."

Obviously, however, there are circumstances in which the test adopted in the instant case by the Fourth Circuit would be inadequate.

It is notable, moreover, that the very source quoted by the Fourth Circuit for its above-discussion conclusion does not require that conclusion. In

Comstock, *supra*, the Court of Special Appeals of Maryland confronted the issue of whether compensation or an agreement to compensate was a *sine qua non* for the establishment of an attorney-client relationship. The court concluded that actual or promised compensation was unnecessary to the formation of an attorney-client relationship. "It is sufficient for such a relationship that the advice or the assistance of an attorney is sought and is received." [Emphasis supplied, citation omitted.] 23 Md.App. at 297. Petitioner submits that the Comstock court held merely that one set of circumstances that established an attorney-client relationship was the acquisition of legal advice that had been sought. The Comstock court did not purport to render a definitive decision on the *indicia* of an attorney-client relationship.

Clearly, that court's simple pronouncement does not exclude the possibility -- one not addressed by the Comstock court -- that the attorney-client privilege may attach to a communication from the client to the attorney, without more.

Thus Mr. Taylor, in whom the confidential communication was reposed, may not properly assume a role which allows him to exploit for another interest, or creates the appearance that he is exploiting for another interest, the information received by him from Petitioner that is within the privilege. This conclusion, Petitioner submits, is implicit in the holdings of Schell and In re Spain.

Conclusion

For the foregoing reasons, Petitioner prays that this court grant

the writ and vacate his conviction.

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RONALD P. FEDORYK,
Petitioner-Appellant,

v.

JAMES B. DUDLEY; JAMES N. ROLLINS; J. JOSEPH CURRAN, JR., Attorney General for the State of Maryland,
Respondents-Appellees.

No. 92-7129

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
John R. Hargrove, District Judge.
(CA-91-3109-HAR)

Argued: May 7, 1993

Decided: June 9, 1993

Before NIEMEYER and WILLIAMS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Glen Marcus Fallin, Ellicott City, Maryland, for Appellant. Kreg Paul Greer, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Baltimore, Maryland, for Appellees. **ON BRIEF:** J. Joseph Curran, Jr., Attorney General of Maryland,

OFFICE OF THE ATTORNEY GENERAL, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Ronald Fedoryk challenges the district court's order denying his request for habeas relief from a Maryland state court conviction for Driving Under the Influence (DUI). On appeal, Fedoryk presents three issues for review: (1) whether his due process rights were violated when an attorney he had previously consulted, but had not retained, regarding his DUI charges, later prosecuted his case; (2) whether he had a due process right to have a chemical test administered after his arrest for DUI; and (3) whether he was entitled to a new trial because the prosecutor violated a suppression order forbidding any inquiry into Fedoryk's alleged refusal to take a chemical test. Finding no error, we affirm.

I.

In the early hours of December 24, 1989, Fedoryk was arrested for Driving While Intoxicated (DWI) and Driving Under the Influence (DUI). Fedoryk approached attorney B.L. Taylor about representing him in connection with these charges. During a short meeting with Taylor, Fedoryk "related to Mr. Taylor all facts within [his] knowledge that were pertinent to the subject charges," but "admitted no guilt and stated no facts from which guilt of any criminal wrongdoing could have been inferred." (J.A. at 63.) Upon his discovery that the incident arose in Howard County, Maryland, Taylor declined representation because he was a part-time prosecutor for Howard County. At that point, Taylor referred Fedoryk to another attorney. During the first day of his trial in circuit court,[1] Fedoryk recognized the prosecut-

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[1]Fedoryk had been previously convicted of DWI in Maryland district court. He was then granted a trial de novo in Maryland circuit court pur-

ing attorney as Taylor, but only made a complaint to the court upon his conviction.[2]

Prior to trial, the circuit court granted Fedoryk's motion for suppression of any evidence concerning his alleged failure to consent to a chemical test. During the trial, however, Taylor asked the arresting officer, Officer Martin, if he informed Fedoryk of his right to a chemical test and Officer Martin responded that he had. Fedoryk's objection to this question was sustained, but he did not request a mistrial.

Fedoryk was subsequently convicted of DUI and was sentenced to 60 days with all but 16 days suspended. He filed a motion for a new trial alleging that Taylor's participation in his prosecution and the violation of the suppression order denied him due process of law. He also alleged that his due process rights had been violated because Fedoryk had requested that he be allowed to take a chemical test to prove his innocence, but had been denied the opportunity to do so. This motion was denied, as were Fedoryk's subsequent requests for a petition for a writ of certiorari from the Maryland Court of Appeals and a petition for a writ of habeas corpus from the United States District Court for the District of Maryland. Fedoryk now appeals.

II.

Fedoryk first argues that he is entitled to relief because Taylor's participation in his prosecution deprived him of due process of law as guaranteed by the Fourteenth Amendment. This court previously has held that "due process is violated when an attorney represents a client and then participates in the prosecution of that client with respect to the same matter." *United States v. Schell*, 775 F.2d 559, 566 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986). The essential question on this issue is whether Taylor ever "represented" Fedoryk in this matter.

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suant to Md. Ct. & Jud. Proc. Code §§ 12-401(a) and 12-403(a) (Michie 1989 & Supp. 1992). Fedoryk's only challenge on appeal is to his conviction in circuit court.

[2]Taylor did not serve as the prosecutor in Fedoryk's trial before the district court.

Under Maryland law, an attorney-client relationship exists if the advice of counsel is "sought and received." *Crest Inv. Trust, Inc. v. Comstock*, 327 A.2d 891, 902 (Md. Ct. App. 1974). Although the fiduciary relationship existing between attorney and client encompasses preliminary consultations, if

> the attorney made it clear to the would-be client that there is no attorney-client relationship and if the evidence further reflects that the would-be client should have known that the relationship had not advanced to the point at which it could be deemed a representation, then there would be no attorney-client relationship despite the would-be client's subjective belief.

Green v. Montgomery County, 784 F. Supp. 841, 845-46 (M.D. Ala. 1992).

The record clearly demonstrates that no attorney-client relationship ever existed between Fedoryk and Taylor. While Fedoryk may have sought legal assistance from Taylor, he did not receive any. *Crest Invest.*, 327 A.2d at 902. Taylor informed Fedoryk after briefly hearing his recitation of the facts that he could not represent Fedoryk due to a potential conflict of interest.[3] Thus, their relationship had not advanced to the point where it "could be deemed a representation,"

[3]The more prudent practice may be for part-time prosecutors not to act as a criminal defense attorneys because of the inherent conflict in representing a person accused of violating the state's law when the attorney has been sworn to enforce those laws by prosecuting individuals who violate them. *Goodson v. Peyson*, 351 F.2d 905, 907-09 (4th Cir. 1965). However, there is no per-se rule prohibiting a part-time prosecutor from representing individuals charged with commission of a crime if the crime occurred in a county other than the county in which the attorney serves as a prosecutor. *Bumgardner v. State*, 401 N.W.2d 211, 213-14 (Iowa Ct. App. 1986). When a part-time prosecutor is also engaged in private practice, he should take reasonable care to establish an office screening mechanism to enable the attorney to determine whether an actual or potential conflict of interest exists before accepting representation. *State ex rel. Bailey v. Facemire*, 413 S.E.2d 183, 185 (W. Va. 1991). The attorney should also immediately inform the prospective client that he is employed as a part-time prosecutor. *See Goodson*, 351 F.2d at 909 n.8.

Green, 784 F. Supp. at 846, and Fedoryk's due process rights were not infringed by Taylor's participation in his trial, *Schell*, 775 F.2d at 566.

The rule in *Schell* is based upon the concepts that a client has a right to be secure in his knowledge that secrets he divulges to his attorney will remain confidential and that the attorney-client relationship is severely compromised when the attorney switches sides, thereby prejudicing his former client. 775 F.2d at 565. Fedoryk admittedly did not divulge any secrets or confidences to Taylor and Taylor did not embark upon any representation of Fedoryk. Therefore, Fedoryk was not prejudiced in any manner by Taylor's actions and the policy concerns in *Schell* have not been offended. Furthermore, Taylor did not recall meeting Fedoryk and Fedoryk made no attempt to alert either Taylor or the trial judge of his consultation with Taylor until after the trial had ended. Under the totality of these circumstances, Fedoryk is not entitled to a new trial due to Taylor's role in the case.[4]

III.

Fedoryk's second argument is that his due process rights were violated when Officer Martin would not allow him to take a chemical test. Fedoryk argues that, although he initially refused Officer Martin's offer of a chemical test because he wanted to consult an attorney, almost two hours later he requested that a test be performed. Officer Martin refused.

Fedoryk did not raise this issue at trial. Instead, he chose to forego this argument and filed a motion in limine seeking to suppress any evidence concerning whether he refused to take a chemical test. In his brief, Fedoryk stated that this was a strategic choice, designed to prevent a credibility contest with Officer Martin over whether he consented to a chemical test. After this tactic proved unsuccessful, Fedoryk requested a new trial in order to argue before a jury that he had not been drinking and had been intentionally denied the opportu-

[4]We also note that at the time of Taylor's prosecution, Fedoryk had already lost one trial in Maryland district court. Therefore, anyone prosecuting Fedoryk in circuit court would have access to his defense.

nity to prove his innocence by Officer Martin's refusal to allow him to take a chemical test.

A petitioner may not raise an issue in federal habeas proceedings that he did not raise at trial in the original state proceeding unless he can show cause and prejudice. *Williams v. Dixon*, 961 F.2d 448, 458 (4th Cir. 1992). We find this rule especially compelling in a case such as this one, where Fedoryk made a decision to forego an argument he could have made at trial in favor of another argument, and, now that his trial strategy failed, he wants a new trial on the abandoned argument. *Reed v. Ross*, 468 U.S. 1, 14 (1984). Inasmuch as Fedoryk has failed to show cause or actual prejudice, he has waived the right to pursue this issue. *Williams*, 961 F.2d at 458.

Even if Fedoryk had not waived this issue on appeal, the due process clause does not require police agencies to administer a chemical test upon the demand of an individual arrested for DUI. *Arizona v. Youngblood*, 288 U.S. 51, 59 (1988). The cases cited by Fedoryk to the contrary are inapposite because they concern only an individual's right to consult with an attorney prior to taking a chemical test, not an individual's due process right to take the test. *Brosan v. Cochran*, 516 A.2d 970, 975-76 (1986); *Sites v. Sites*, 481 A.2d 192, 200 (Md. 1984).

IV.

Finally, Fedoryk argues that Taylor's violation of the suppression order entitled him to a mistrial and new trial. In this habeas proceeding, the district court, adopting the magistrate judge's recommendation, refused to address this issue on the ground that the Maryland circuit court denied this claim based on a state law procedural bar, namely Fedoryk's failure to request a mistrial at the time of the violation in question. The magistrate's recommendation complies with Maryland's contemporaneous objection rule, which requires a party seeking specific relief from a trial error to "make known to the court the action the party desires the court to take" at the time of the ruling the party seeks to challenge. Md. Rule 4-323(c).

A federal court "will not review a question of federal law decided by a state court if the decision of the court rests on a state law ground

that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 111 S. Ct. 2546, 2553-54 (1991). Denying a claim because a party failed to comply with a state's contemporaneous objection requirement is an adequate and independent state ground for the denial of federal habeas relief. *Wainwright v. Sykes*, 433 U.S. 72, (1977).

V.

For the reasons stated above, the order of the district court denying Fedoryk's petition for a writ of habeas corpus is affirmed.

AFFIRMED

BLANK

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RONALD P. FEDORYK,	)	
	)	
Petitioner	)	
	)	
v.	)	**Civil No. HAR-91-3109**
JAMES B. DUDLEY, *et al.*,	)	
	)	**[Filed Oct. 30, 1992]**
Respondents.	)	

CERTIFICATE OF PROPABLE CAUSE

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, a certificate of probable cause for an appeal in the above case is hereby GRANTED.

/s/ John R. Hargrove,
United States District
Judge

Dated: October 30, 1992

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RONALD P. FEDORYK,	)	
	)	
Petitioner	)	
	)	
v.	)	**Civil Action No. HAR-91-3109**
JAMES B. DUDLEY, *et al.*,	)	
	)	**[Filed Sep. 29, 1992]**
Respondents.	)	

ORDER

This Court has reviewed the Report and Recommendation of United States Magistrate Judge Kenkel in the above referenced case and the objections thereto. As the Court agrees with Judge Kenkel's findings and conclusions, said Report and Recommendation is hereby adopted.

Therefore, IT IS this 25th day of September, 1992, by the United States District Court for the District of Maryland hereby ORDERED:

1. That Ronald P. Fedoryk's Petition for Writ of Habeas Corpus Be, and the same hereby IS, DENIED.

2. That the Clerk of the Court CLOSE this case.

3. That the Clerk of the Court mail copies of this Order to all parties of record.

/s/ JOHN R. HARGROVE
United States District Judge

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RONALD P. FEDORYK,	)	
	)	
Petitioner	)	
	)	
v.	)	**Civil Action No. HAR-91-3109**
JAMES B. DUDLEY, *et al.*,	)	
	)	**[Filed Sept. 11,**
Respondents.	)	**1992]**

REPORT AND RECOMMENDATION

On October 29, 1991, Ronald P. Fedoryk filed a pro se petition for writ of habeas corpus challenging the constitutionality of his state court conviction. By order dated March 17, 1992, (Hargrove, J.) this case was referred for processing and disposition in accordance with Rules Governing Cases under 28 U.S.C. § 2254.

On April 16, 1991, petitioner was convicted after trial by jury in the Circuit Court for Howard County of driving while under the influence of alcohol in violation of Md. Trans. Art.

21, § 902(b). Petitioner was sentenced by the Honorable James B. Dudley to 60 days incarceration, all but sixteen days suspended and three years probation. (Respondents' Exhibit 1). On April 25, 1991 petitioner filed a motion for new trial. After a hearing, Judge Dudley denied the motion. (Respondents' Exhibit 7). On July 8, 1991, petitioner filed a petition for writ of certiorari to the Maryland Court of Appeals requesting review of the denial of the motion for new trial. (Respondents' Exhibit 12). By order dated October 9, 1991 the Court of Appeals denied the petition. (Respondents' Exhibit 14). [1/]

In this federal petition, petitioner

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1. Petitioner's case originated in the District Court of Howard County. He appealed his conviction and was granted a trial de novo in the Circuit Court. In such cases, further appellate review is to the Court of Appeals of Maryland. Md. Ann. Code, Cts. & Jud. Proc. Art., §§ 12-305, 12-307.

alleges as error the same grounds raised in his motion for new trail and in his petition for writ of certiorari: (1) that the prosecutor in the case, Bernard Taylor, should have recused himself because petitioner had consulted with him in his capacity as a private attorney about representing petitioner in the same case; (2) that petitioner's conviction was obtained by use of evidenced seized in violation of the Fourth Amendment; (3) that petitioner's due process rights were violated by the arresting officer's refusal to allow him to take a chemical test; (4) that petitioner was denied his right to an impartial jury by the trial court's refusal to excuse for cause five jurors; and (5) that the prosecutor violated the trial court's order in limine by eliciting testimony from the arresting officer regarding petitioner's alleged refusal to take a chemical test.

Respondents' concede that petitioner has exhausted these claims in the state courts as required by 28 U.S.C. § 2254(b).

Claim 1: Conflict of Interest

Petitioner claims that his due process rights were violated because the petitioner had consulted with the assistant state's attorney, Bernard Taylor in the prosecutor's capacity as a private attorney. Judge Dudley, in denying petitioner's motion for new trial, found as a fact that petitioner had gone to Mr. Taylor's office to "consult him about his recent arrest for a drunk driving case. And in the course of that, by his own testimony and affidavit, communicated to Mr. Taylor that the total sum of all the facts was a very long column of zeroes, namely that

he was not guilty and as [petitioner's] affidavit states, told him nothing from which guilt could be inferred." (Respondents' Exhibit 11 at 73-76). [2/] Judge Dudley accepted as true the factual aversions of petitioner's affidavit wherein petitioner states that after petitioner explained his version of the case to Taylor, which essentially was that he was innocent of the charge, Taylor told him that he could not represent petitioner because Taylor "had a potential conflict of interest" due to his part-time position as an assistant state's attorney for Howard County. Taylor then referred petitioner to another attorney whose office was in the same building and took him to the office. Taylor's position, also accepted as

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2. All of Judge Dudley's factual determinations are entitled to a presumption of correctness under 28 U.S.C. § 2254 (c) and Townsend v. Sain, 373 U.S. 293 (1963).

factually true by Judge Dudley, is that while in a part-time position with the Howard County State's Attorney's Office he was allowed to maintain a private practice but was prohibited from doing criminal defense work in Howard County or any representation involving the Howard County Police or the Maryland State Police. Taylor testified that therefore he would ask prospective clients what they were charged with and what county was involved. He further testified that if Howard County was involved, he would immediately refer the person to another attorney. (Respondents' Exhibit 11 at 41-43). Taylor testified that he did not remember petitioner and that his office did not have a case file under petitioner's name. Petitioner also stated that he did not recognize Taylor until sometime during the first day of trial but did not realize the potential for a

conflict of interest until two days after the conclusion of the trial.

In denying the motion for new trial, Judge Dudley recognized that if the issue had come to light during the trial, a mistrial would have been declared and Taylor would have been replaced in the case. However, Judge Dudley ruled that the legal issue at the motion for new trial stage was whether the state gained any advantage from the communication to the prejudice of the petitioner and whether there was any prosecutorial misconduct. Judge Dudley concluded that no inculpatory statements were made to Taylor to give the State any advantage at trial and that there was no prosecutorial misconduct. (Respondents' Exhibit 11 at 73-76).

Petitioner now argues that Judge Dudley applied the wrong legal standard in analyzing the issue. Both respondents

and petitioner rely on United States v. Schell, 775 F. 2d 559 (4th Cir. 1985). In Schell, the Fourth Circuit held that "when after representing a client, a lawyer joins in the criminal prosecution of that client with respect to the identical matter about which the attorney originally counseled the client "violates the due process clauses of the Fifth and Fourteenth Amendments and is per se prejudicial. Id. at 565 (emphasis in original). The facts in Schell could lead to no other conclusion than that an assistant U.S. attorney who had represented two clients during grand jury proceedings later participated in the prosecution of those clients. The attorney's "representation" included office visits as well as consultations during breaks in the proceedings. Id. at 563. Petitioner argues that the facts in the instant case are similar in that

petitioner's office visit with Taylor during which petitioner discussed the facts of the case, amounts to "representation" as envisioned in Schell. Petitioner also relies on the American Bar Associations Rules of Professional Conduct, Rule 1.2 which requires that a prosecutor avoid even the appearance of a conflict of interest and prohibits prosecution of a former client whom the prosecutor previously represented in the same case.

In the instant case, unlike Schell, the facts clearly support the conclusion that Taylor never "represented" petitioner in the criminal case. Petitioner went to Taylor for an initial consultation, gave his version of the events surrounding his arrest and importantly gave no incriminating statements. Once Taylor discovered that Howard County was involved, even

according to petitioner, Taylor informed petitioner of the conflict of interest, referred him to another attorney and immediately took petitioner to the attorney's office. Based on Judge Dudley's factual findings, there is no question that at trial Taylor never recognized petitioner and therefore never brought to light the conflict of interest issue. Under Maryland Lawyer's Rules of Professional Conduct, Rule 1.6(a)(2), Taylor did exactly as required of any lawyer - he declined representation of petitioner when he recognized that representation would result in a conflict of interest. While, as stated by Judge Dudley, the situation could better have been remedied at the trial stage if these facts had come to light, Schell does not require a new trial under the particular facts of this case.

Claim 2: Unconstitutional Search

and Seizure

From the petition it appears that this claim is challenging the grounds for the initial stop of the petitioner's vehicle, the search of his car and his subsequent arrest. Under Stone v. Powell, 428 U.S. 465 (1976) federal habeas corpus relief is not available for alleged Fourth Amendment violations were the petitioner had had a full and fair opportunity to litigate the issues in state court. The docket entries in the instant case reflect the fact that a motion to suppress was filed and heard by Court April 15, 1991. (Respondents' Exhibit 1 & 3). While the issue raised in the motion differs from that presented in the instant petition, the fact remains that there is no evidence that the petitioner was not afforded the full and fair opportunity to litigate

this Fourth Amendment claim. See, Md. Rule 4-252; Boggs v. Bair, 892 F. 2d 1193 (4th Cir. 1989).

Claim 3: Due Process

Petitioner claims that the arresting officer refused to allow him to take a chemical test in violation of the Due Process Clause of the Fourteenth Amendment. Respondents argue that this claim is barred by petitioner's procedural default in the state courts. In support of this argument, respondents point to Judge Dudley's ruling at the hearing on the motion for new trial. In addressing this claim Judge Dudley repeatedly emphasized that the issue was not raised during the trial and that in fact, the defense had successfully moved for an order in limine to prevent the state from introducing any testimony or

evidence on the issue of the defendant's refusal to take a chemical test:

> [Petitioner] testified to the jury concerning all of the circumstances relating to his pre-apprehension, his apprehension and his post apprehension at the Howard County Police Department. And if he wanted the jury to know about the breathalyzer, he had an opportunity to testify to it. If he wanted them of he wanted the court to rule that he had been deprived of his legal right by the police officer, that could have been established in the record and the Court required to rule on that. That was never established on the record and therefore that issue was never preserved. It wasn't a -- that question was never raised. As to whether or not he was illegally deprived of the opportunity to take the breathalyzer by the police officer. That was not it. That was carefully avoided.

(Respondent's Exhibit 10 at 18). However, the court at one point of the discussion did state that "I'm not making any ruling at all" and that "any rulings [made by the court prior to the jury verdict], either at the request of the State or at the request of the defense, are matters of record. And those things can only be reviewed by an appeal. They can't be reviewed on a motion

for new trial." Id. at 16. The court then agreed with the defense counsel's legal argument that the court did have the power on a motion for new trial to address the issue: "I think you're correct. . . I have the right . . ." Id.

In Harris v. Warden, 489 U.S. 255 (1989) the Supreme Court held that the "plain statement" rule of Michigan v. Long, 463 U.S. 1032 (1983) applies to habeas proceedings. Therefore a procedural default will not bar consideration of a federal claim on habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar. In the instant case, the last state court addressing petitioner's claim did not clearly and expressly state that the claim was barred by a state procedural rule. cf. Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546 (1991).

As to the merits of petitioner's claims, the petitioner has put forth no authority for the proposition that the Fourteenth Amendment requires a police agency to provide a breathalyzer test upon demand. Maryland courts, as well as other jurisdictions, have recognized a due process right to communicate with an attorney prior to the administration of a breathalyzer test, Sites v. State, 300 Md. 702, 481 A.2d 192 (1984), and the due process right to have a private test administered if it does not "substantially interfere with the timely and efficacious administration of the [State] testing process", Brosan v. Cochran, 307 Md. 662, 516 A.2d 970 (1986). However, the petitioner's broad expansion of those rights, conferring an affirmative duty on law enforcement agencies to provide a test on demand, is not supported by federal constitutional precedent.

Claim 4: Jury Selection

Petitioner claims that his Sixth Amendment right to an impartial jury was violated when the trial court refused to strike five jurors for cause. Judge Dudley's opinion denying the motion for new trial did not address this issue. However, the transcripts of the voir dire and jury selection process support the respondents' position that in fact the trial court rejected challenges for cause against only two of the five jurors identified by petitioner, petitioner having failed to challenge the other three for cause. (Respondents' Exhibit 4 at 5-7, 33-36, 43-46, 49-51, 56-58). Further, the record also supports the fact that petitioner had one remaining preemptory challenge which he waived any trial counsel stated that the jury was acceptable. Id. at 69-71.

To establish error of a constitutional

magnitude, the burden is on the petitioner to show that the trial court's conduct of the voir dire prejudiced him and led to an unfair trial. United States v. Griley, 814 F. 2d 967 (4th Cir. 1987). The trial court has wide discretion in deciding whether to excuse a juror for cause and jurors are presumed to be impartial. Person v. Miller, 854 F. 2d 656 (4th Cir. 1988). In the instant case, each of the questioned jurors stated that they could render an impartial decision based on the evidence. There is no evidence of prejudice or abuse of the trial court's discretion. Trial counsel's waiver of one preemptory challenge and acceptance of the jury strongly supports this conclusion and would bar consideration of this issue under Maryland law. Trimble v. State, 321 Md. 248, 257, 582, A.2d 794, 798-99 (1990).

Claim 5: Violation of Motion in Limine

Petitioner claims that his due process

rights were violated by the prosecutor's violation of an order in limine which forbade the prosecutor from introducing evidence of the petitioner's alleged refusal to submit to a breathalyzer. During the testimony of the arresting officer the prosecutor asked whether the officer advised petitioner of his right to a chemical test. (Respondent's Exhibit 5 at 18). Trial counsel objected and, after a bench conference, the objection was sustained. Id. at 19. No motion to strike or motion for mistrial was made. Before Judge Dudley at the hearing on the motion for a new trial petitioner claimed that the court should have given a curative instruction or declared a mistrial. Judge Dudley found that had the motion been made by trial counsel, the court would have been forced to rule. Id. 26. Judge Dudley then expressed his determination that the absence of such a defense motion meant that counsel had determined it was better trial

strategy not to accentuate the issue. He then concluded that "[a]nd motion for mistrial wasn't made. I can't rule on one that's not made." Id.

Respondents' argue that review of this claim is barred by the doctrine of procedural default. While Judge Dudley did not cite to Maryland's contemporaneous objection rule, Md. Rule 4-323(c)3, [3/] his decision that neither the trial court nor the court hearing a motion for a new trial can address a request for a ruling or order which was "not made" at trial, clearly falls within the "plain statement rule" of Harris v. Warden, 489 U.S. 255 (1989). In Wainwright v. Sykes, 433 U.S. 72 (1977), the Supreme Court held that failure to comply with a state's

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3. Md. Rule 4-232(c) states in pertinent part: "For purposes of review by the trial court or on appeal [. . .] of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought makes known to the court the action that the party desires the court to take..."

contemporaneous objection rule provides adequate and independent state grounds for denial of federal habeas corpus relief. The "adequacy component is satisfied if the procedural bar is "regularly or consistently applied" by the state court. Johnson v. Mississippi, 486 U.S. 578 (1988). To procedural default, a petitioner must show both cause and prejudice. Wainwright. In this case there is no question that Maryland courts regularly follow the rule. See, Leuschner v. State, 41 Md. App. 423, 397 A. 2d 622, cert. denied, 444 U.S. 933 (1980); Gault v. State, 231 Md. 78, 188 A. 2d 539, cert. denied, 375 U.S. 851 (1963) (failure to move to strike testimony). Further, petitioner, at the motion for new trial hearing, and in his reply to respondents' answer to the federal petition, correctly acknowledges the dilemma faced by trial counsel in weighing the potential negative consequences of moving for this mistrial.

In so doing, petitioner supports Judge Dudley's conclusion that the decision was one of strategic choice. Accordingly. petitioner cannot meet the cause and prejudice standard of Wainwright. Griffin v. Aiken, 775 F2d 1226 (4th Cir. 1985), cert denied, 478 U.S. 1007 (1986). [4]

Based on the foregoing, it is hereby RECOMMENDED that the petition for writ of habeas corpus be DENIED.

James E. Kenkel,
U.S. Magistrate-Judge

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4. Petitioner also alleges that the dialogue leading up to the question regarding the offer of a chemical test also violated the in limine order. (Paper 13, Reply to Answer to Petition for Writ of Habeas Corpus at 13014). However, the trial record reflects that no objection at all was made to this testimony. See, Md. Rule 4-323(a); Respondents' Exhibit 5 at 18.

IN THE COURT OF APPEALS OF MARYLAND

RONALD P. FEDORYK	)	
	)	
v.	)	Petition No. 264
	)	September Term, 1991
STATE OF MARYLAND	)	(No. 022620 - Circuit
	)	Court of Howard County)

ORDER

Upon consideration of the petition for a writ of certiorari to the Circuit Court for Howard County and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy,
Chief Judge

Date: October 9, 1991

IN THE CIRCUIT COURT FOR HOWARD COUNTY, MARYLAND

STATE OF MARYLAND	)	Crim. No. 22620
	)	[Excerpt of pro-
vs.	)	ceedings on June 6,
	)	1991]
RONALD P. FEDORYK.	)	

TRIAL JUDGE'S COMMENTS UPON DENYING MOTION FOR NEW TRIAL

THE COURT: Well, the Court is satisfied from the testimony and the evidence in the case that, uh, there is no substantial dispute requiring a resolution of credibility here, or that credibility -- the Court need establish the credibility of the witnesses to resolve a, an issue of fact. There is no disputed issue of fact. Mr. Fedoryk went to Mr. Taylor to consult him about his recent arrest for a drunk driving case. And in the course of that, but his own testimony and by his own affidavit, communicated to Mr. Taylor that the total sum of all of the facts was a very long column of zeros, namely, that he was not guilty and as your affidavit states, told him nothing from which guilt could be inferred. Now the problem that we have is that, uh, I think the canons of ethics are such that had Mr. Taylor in good faith, um -- My recollection is, is that when lawyers are retained by clients, it's difficult to remember their face. When lawyers are not paid by clients it's almost impossible to remember their face or their, or their cause. And here, after a substantial period

of time passes, Mr. Taylor becomes employed by the State and ultimately is assigned the trial of the case. I don't think anyone has suggested even remotely that at any time Mr. Taylor ever recognized Mr. Fedoryk. The proof of the fact that that could be a one hundred percent honest mistake is that fact that Mr. Fedoryk went sixty, seventy, eighty or ninety percent of the way through the trial without recognizing Mr. Taylor -- or when Mr. Fedoryk recognized Mr. Taylor, the matter was not brought to anyone's attention and he did not communicate that fact. The situation could have been addressed then by all counsel and parties in the case and that situation could have been rectified immediately. And the Court would not have hesitated for a second in declaring a mistrial to insure that the case would start over and that the State would be represented by someone who, one, had never met Mr. Fedoryk and knew nothing about him, and two, the Court would have prevented Mr. Taylor from communicating with anyone else in the State's Attorney's Office concerning the matter. That's the benefit of hindsight, which only judges have. And now we've passed the bridge to the point where, based upon the testimony and evidence in the case, the jury ruled unanimously that Mr. Fedoryk was guilty of driving under the influence of alcohol. Mr. Taylor did not testify in that case, although he participated as an Assistant State's Attorney. So the next question is, is there any evidence that based upon that communication or attempted consultation that the State gained any

benefit from that which would have been utilized to the State's advantage and to the detriment of Mr. Fedoryk. The Court's attention has been brought to no such incidence in the transcript and I'm satisfied that after having researched this issue with my law clerk, and even after -- especially after having read the case that was provided to the Court -- a copy of which escapes me at the moment. Ex Parte Raleigh George Spain, Jr. [589 SW2d 132 (en banc).] The case is factually inapplicable to our situation. One is because they have a statute, and two, because the attorney there was in fact representing the defendant in the prior proceeding as his defense attorney. And then when he was later employed in the State's Attorney's Office he moved to revoke his probation. Now that is, is not, uh, remotely similar. There are difficult legal, ethical questions raised in that case which I have reviewed in this case, and I, and I do not dispute for one second that had this matter been brought to the Court's attorney attention or to Mr. Taylor's attention or to Mr. May's attention or Mr. Fallin's attention prior to the trial, the problem would have been rectified immediately. Had it been brought to the Court's attention or anyone else's attention during the course of the trial, the problem would have been rectified immediately. It's only now, when you have a post trial microscopic examination that the matter has been brought to our attention and I am therefore satisfied that the legal test is now whether or not there was

any prosecutorial misconduct. As that legal concept has been discussed and explored in other cases in Maryland. And under the circumstances the Court is satisfied that that standard has not been established in support of the motion for new trial. And for that reason, the motion for new trial is denied.

[Next page is A. 82.]

IN THE CIRCUIT COURT FOR HOWARD COUNTY

STATE OF MARYLAND	)	
	)	
vs.	)	Crim. No. 22620
	)	
RONALD P. FEDORYK,	)	[Filed April 25, 1991]
Defendant.	)	

AFFIDAVIT OF DEFENDANT IN SUPPORT OF MOTION FOR NEW TRIAL

Defendant, Ronald P. Fedoryk, affirms as follows under penalty of perjury and on personal knowledge.

1. I am Ronald Paul Fedoryk, Defendant in the above-captioned case.

2. Trial of the instant case was had in the Circuit Court for Howard County on April 15 and 16, 1991. The prosecutor was Bernard Taylor, Esq., an Assistant State's Attorney for Howard County. The case was tried by a jury, which rendered a verdict of guilty of Sec. 21-902(b) of Maryland Code Transportation. The Hon. James B. Dudley, Associate Judge of the Fifth

Judicial Circuit of Maryland, presided at the trial and, at its conclusion, imposed a sentence of 60 days' imprisonment, with all but 16 days of that term suspended and the 16 days to be served on four weekends; a term of supervised probation for three years; an alcohol restriction on my driver's license; referral to Alcoholics Anonymous and counseling as directed by the probation agent; a fine of $350 and payment of court costs of $100.

3. The events that resulted in my being charged with the offenses that led to my conviction as stated above occurred on December 24, 1989.

4. In late January or early February, 1990, I engaged in an attorney-client consultation with Mr. Taylor for the purpose of retaining him to represent me in the defense of the subject charges. During the course of this consultation I

related to Mr. Taylor all facts within my knowledge that were pertinent to the subject charges. I admitted no guilt and stated no facts from which guilt of any criminal wrongdoing could have been inferred. At the conclusion of the consultation, Mr. Taylor stated that he had a potential conflict of interest because of what he said was part-time employment by the State or the State's Attorney's Office. Mr. Taylor thereupon referred me to another attorney, whom I consulted. I ultimately retained my present counsel, D. Joseph May, Esq., to represent me at trial on the subject charges in the District Court of Maryland for Howard County and, upon conviction there, Mr. May continued to represent me for trial in this court.

5. During the first day of the trial, I first realized that an attorney whom I had consulted to represent me in

the instant case -- i.e., Mr. Taylor -- was serving as prosecutor in the case. In his cross examination of me during the defense phase of the trial, Mr. Taylor asked me if I had "ever discussed this case with anyone else" or words to that effect. When he asked me this question, Mr. Taylor initially appeared to be puzzled or perplexed, and then an expression of recognition appeared upon his face. He appeared to be confused and perplexed for several minutes thereafter, and then withdrew the question.

6. At no time until the late afternoon of Thursday, April 18, 1991, did I realize or recognize that there could be any impropriety in Mr. Taylor serving as prosecutor, since I had not admitted any wrongdoing in my consultation with him and had asserted to him that I was completely innocent of any wrongdoing.

7. Except as stated above, at no time did Mr. Taylor disclose to me any conflict or potential conflict of interest posed by his serving as prosecutor in the instant case after having been consulted by me for the purpose of representing me in connection with the charges that were tried as aforesaid. Nor did Mr. Taylor ever obtain or attempt to obtain my consent to his serving as prosecutor in the instant case.

8. In the incident that led to my conviction, I was stopped while traveling southbound on Interstate 95, past the entry ramp to eastbound Rte. 216 from I-95 south, and immediately after having entered I-95 south from Md. Rte. 216 westbound. The stop was made by Howard County Police Office Michael Martin at approximately 12:48 a.m. on December 24,

1989.

9. During the course of the traffic stop referred to above, Officer Martin conducted a search of my automobile without requesting my consent and prior to announcing that I was being arrested. Officer Martin's first words to me were: "Where'd you hide the beer?" When I replied that I had no beer, he retorted: "I'll find some." He then shined his flashlight throughout the interior of my vehicle, and then entered my vehicle and looked under the front seat from the front and rear.

10. Also during the stop, Officer Martin administered a preliminary breath test ("PBT") to me. He asked me to blow into a straw protruding from a small black box. I did so three times. Each time, Officer Martin complained that he was not getting a breath reading. Officer Martin then said he was going to

say that I had refused to take the breath test, and he did make tnat allegation in the Police incident report that he prepared (and which I have reviewed).

11. Officer Martin also administered a series of field sobriety tests to me during the above-described traffic stop. I performed every element of the tests as requested by him and without any difficulty.

12. After the field sobriety tests as described above, Officer Martin handcuffed me, without stating that I was being arrested and without informing me of the charge or charges, and transported me in his marked police cruiser to the Howard County Police Department Headquarters in Ellicott City. During the trip to Police Headquarters, I asked Officer Martin why he had stopped me. He responded that I had "crossed the line back there", and then he smiled

sarcastically and uttered softly, "Ha."

13. Also during the trip to Police Headquarters and during the stop, Officer Martin asked me repeatedly if I would consent to take a "breath test". I responded that, before electing to take or not to take the test, I wished first to speak with a lawyer and to have a lawyer present during any questioning by Officer Martin. At no time did I refuse to take the test. We arrived at Police Headquarters at approximately 1:30 a.m. Immediately upon our arrival there, Officer Martin placed me in a holding cell, without allowing me to make a telephone call. When I inquired whether I had a right to make a telephone call, Officer Martin responded: "I don't care what you think your rights are, or what the law says. The only thing I'm worried about is convictions. I've had over 300 convictions in the past few years.

You're not going to make any telephone calls."

14. I remained in the holding cell for approximately one hour, until 2:30 a.m., when Officer Martin permitted me to attempt to make a telephone call, but initially without advising me as to how to dial a long-distance call. When he did tell me how to dial a long-distance call, I did, but was unable to reach a lawyer.

15. While I was attempting to make the call, Officer Martin stood directly behind me, so close that I could feel his breath. When I requested to be permitted to make the call to my lawyer in private, he refused.

16. At 2:35 a.m. on December 24, 1989, I stated to Officer Martin that I wished to take the breath test. Officer Martin responded: "No, I decided a long time ago that you have refused to take

the breath test." I then asked Officer Martin to show me his wristwatch, so that we could both confirm the time of his refusal to permit me to take the breath test. The time was precisely 2:35 a.m., which was within two hours of the initial traffic stop.

17. Officer Martin did not show me or give me a copy of the Form DR-15, a true and correct copy of which is submitted herewith as Exhibit 1, until I appeared before a Howard County Court Commissioner at approximately 3:30 a.m. The Commissioner released me on my own recognizance at 3:38 a.m. without restricting my right to drive my car. On the DR-15, Officer Martin wrote that I had refused the breath test at 1:05 a.m. on December 24, 1989; yet he had repeatedly asked me, after 1:05 a.m., whether I would agree to take a breath test. Officer Martin also placed his own

signature on the line of the DR-15 that says "refused". At no time did I refuse to take the test or refuse to sign the DR-15; had I had an opportunity to sign the DR-15, I would have stated thereon that I had not refused to take the chemical test. Had I had the opportunity to sign the DR-15 after I had affirmatively requested to take the chemical test as stated above, I would have stated thereon that I had requested to take the breath test but that Officer Martin had denied me the opportunity to do so.

18. I was reluctant to answer Officer Martin's questions or take a chemical test without first speaking with a lawyer and having a lawyer present because Officer Martin was obviously biased and I feared that he would later misrepresent any statement that I made and that possibly the reported test

results would be not be fair, accurate and objective.

19. Had I been permitted to take a chemical breath test, and had the test accurately measured my blood-alcohol content, the test would have reflected that I was neither intoxicated nor under the influence of alcohol.

VERIFICATION

I HEREBY AFFIRM under penalty of perjury and on personal knowledge that the foregoing is true and correct.
Executed on _____.

/s/ RONALD PAUL FEDORYK